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89-1656

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

STEPHEN GOOT,

Petitioner,

- vs. -

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is a defendant's right to counsel and right of due process pursuant to the Fifth and Sixth Amendments of the United States Constitution violated when the United States Attorney's Office prosecuting the defendant has as the United States Attorney for that office, the attorney who originally served as private defense counsel for the defendant and defendant is not afforded the opportunity of a hearing on his Motion to Disqualify the United States Attorney's Office?

2. Is the defendant's right against cruel and unusual punishment pursuant to the Eighth Amendment of the Constitution of the United States violated when the maximum sentence is imposed against the defendant by the court and said sentence is grossly disproportionate to a more culpable co-defendant, grossly exceeds other sentences imposed on similarly situated defendants, grossly exceeds unenacted sentencing guidelines and is imposed with no comment or rationale given by the trial court?

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October Term, 1989

STEPHEN GOOT,

Petitioner,

- vs. -

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner STEPHEN GOOT, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit issued on January 24, 1990, affirming Petitioner Goot's conviction and sentence.

CITATION TO OPINIONS BELOW

The opinion of the United States Court of

Appeals for the Seventh Circuit, filed on January 24, 1990, is reported at 894 F.2d 231 (1990) and is reprinted as Appendix A.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit affirming Goot's conviction and sentence was issued on January 24, 1990. The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit is invoked under 28 U.S.C.§ 1954(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Amendments to the United States Constitution are applicable to this case:

> Amendment 5
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining Witnesses in his favor and to have the assistance of counsel for his defense.

Amendment 8

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Petitioner Stephen Goot, a practicing attorney in Lake County, Indiana was charged on October 20, 1987 with a two count federal Indictment with Racketeering and Conspiracy to Commit Racketeering pursuant to 18 U.S.C. § 1962(c) and (d). He was convicted after a trial by jury on March 24, 1988 and thereafter sentenced to a term of imprisonment of twenty (20) years on each count, said sentences to run concurrently. The defendant was further ordered to pay a fine of Twenty Five Thousand ($25,000.00) Dollars and a

forfeiture of Nine Thousand ($9,000.00) Dollars. Defendant Goot presented eight (8) issues on appeal to the United States Court of Appeals for the Seventh Circuit. The Court on January 24, 1990 affirmed the judgment of the district court. (See Appendix A).

In April of 1984, Defendant Goot retained Attorney James Richmond to represent him. From April 16, 1984 to August, 1985, while under government investigation, he was continously represented by Attorney James G. Richmond. On August 26, 1985, Attorney James G. Richmond was appointed United States Attorney and recused himself from representing Goot and from likewise prosecuting him. He appointed in his stead, Assistant United States Attorney John F. Hoehner as the Acting United States Attorney on this case. Assistant United States Attorney John F. Hoehner was at that time, an assistant to USA Richmond, the United States Attorney for the Northern District of Indiana.

In December, 1987, shortly after the Indictment was returned, Goot filed a timely pre-

trial motion to disqualify the United States Attorney's Office on the grounds that his Fifth Amendment Right of Due Process and his Sixth Amendment Right to Counsel were violated by the prior representations by Richmond. The District Court denied this motion finding that the Indiana Rules of Professional Conduct did not require recusal of the entire United States Attorney's Office for the Northern District of Indiana. The court further denied Defendant Goot the opportunity of a hearing, opportunity to present evidence, and the opportunity to cross-examine witnesses on his motion. The trial court, in denying this request, found that such a "hearing would only be for the purpose of 'going fishing'."

Defendant filed with the trial court a motion entitled "Additional Evidence in Support of Goot's Motion to Disqualify United States Attorney's Office of the Northern District of Indiana From Prosecuting Goot." This documentation included evidence that the United States Attorney's Office had previously recused themselves in a matter related to Defendant Goot and appointed an

assistant United States Attorney for the Southern District of Indiana. The United States Court of Appeals for the Seventh Circuit found this prior disqualification irrelevant to United States Attorney Richmond's office disqualification in prosecuting Defendant Goot. (Appendix A, p.12).

On appeal, Defendant Goot, further argued that the alleged screening claimed by the Affidavits of the United States Attorney's Office were inaccurate in that documents filed by the office contained Richmond's name as United States Attorney. Further, an Affidavit by AUSA Meyer implied that Richmond had recused himself from all Operation Bar Tab matters, an allegation that was in fact inaccurate as provided by a document showing his involvement. The United States Court of Appeals for the Seventh Circuit, although "troubled" by this last aspect, and finding that it "could give rise to an appearance of impropriety" found that a balancing test between the government, defendant, and public negated any indications of improper screening. (Appendix A, p.10-11).

On appeal to the United States Court of Appeals for the Seventh Circuit, Defendant Goot, also argued that his maximum sentence of twenty (20) years was violative of the Eighth Amendment to the United States Constitution.

Defendant Goot was alleged to have participated in a scheme with Deputy Prosecutor Nick Morfas for the improper disposition of drunk driving cases in the Lake County courts of Indiana. Morfas admitted that he forged the Defendant's name on the back of bond checks, stole and destroyed files from the Prosecutor's Office and destroyed court files. Pursuant to a Plea Agreement, Morfas testified that he used Defendant Goot's name as the attorney representing drunk driving defendants in that he was prohibited from the practice of criminal law by his prosecutorial position. Where Morfas was a necessary element to the fruition of these offenses, it would have been impossible for Defendant Goot to have committed any alleged crime without the presence of Morfas.

The government admitted in their argument

that Morfas' conduct was comparable if not more culpable than Defendant Goot when the Assistant United States Attorney stated, "Morfas is just as bad, if not worse, than Goot." Tr., P.1545. Despite this statement, and the evidence of a significantly greater culpability on the part of Morfas, the district court sentenced Morfas to four (4) years and Goot to twenty (20) years.

Defense counsel for Goot requested that the court provide a statement in explanation of this sentence. The District Court, however, failed to comply with Defendant's request and provided no explanation for the sentence imposed. The failure to explain the incongruity in sentence was emphasized on appeal in noting that Defendant Goot's sentence grossly exceeded sentences recommended by the new sentencing guidelines[1] and further exceeded sentences imposed on similarly situated attorneys and judges.

[1]If defendant had been sentenced pursuant to Sentencing Guidelines according to trial counsel, his sentence range would have been between twelve (12) and thirty-eight (38) months. (Tr., sentencing hearing, p.6. See also, Appendix A, p.13 fn.11). It should be noted that a 12-18 month sentence was a sentence noted to the Hon. James Moody by the probation department. (Sentencing Hearing, Tr., p.6, lines 2-7).

Although the United States Court of Appeals for the Seventh Circuit stated that the wise practice was to explain a disparity in sentencing, the imposition of this sentence was not an "abuse of discretion or constitutionally disproportionate." The court emphasized the availability of a motion pursuant to Federal Rules of Criminal Procedure, Rule 35(b), to adjust any improper sentence.

REASON FOR GRANTING THE WRIT

I.

IS A DEFENDANT'S RIGHT TO COUNSEL AND RIGHT OF DUE PROCESS PURSUANT TO THE FIFTH AND SIXTH AMENDMENTS OF THE UNITED STATES CONSTITUTION VIOLATED WHEN THE UNITED STATES ATTORNEY'S OFFICE PROSECUTING THE DEFENDANT HAS AS THE UNITED STATES ATTORNEY FOR THAT OFFICE, THE ATTORNEY WHO ORIGINALLY SERVED AS PRIVATE DEFENSE COUNSEL FOR THE DEFENDANT AND DEFENDANT IS NOT AFFORDED THE OPPORTUNITY OF A HEARING ON HIS MOTION TO DISQUALIFY THE UNITED STATES ATTORNEY'S OFFICE?

This court should grant the writ in this case

to consider and decide whether the Fifth and Sixth Amendments to the United States Constitution are violated when the United States Attorney's Office prosecuting the defendant has, as the United States Attorney of that office, the attorney who formally represented the defendant. As a result of this case, there now exists a jurisdictional dicotomy on the issue of whether it is appropriate to use a subordinate as a institutional screening mechanism to insulate a superior against charges of conflict of interest.

Indiana's Code of Professional Responsibility, Rule 4, provides that "a lawyer should preserve the confidences and secrets of a client." Canon 9 of the Code provides that "a lawyer should avoid even the appearance of professional impropriety." In interpreting these provisions, Indiana case-law has found that when a prosecutor has formally represented a client, his entire office is subsequently disqualified from prosecuting that individual. See, e.g., Banton v. State, 475 N.E.2d 1160 (Ind.App. 1985); State v. Tippecanoe, 432 N.E.2d 1377 (Ind.App. 1982); State ex rel

Goldsmith v. Superior Court of Hancock County, 386 N.E.2d 942 (Ind. 1979); See also State v. Hardy, 408 N.E.2d 313 (Ind.App. 1980); In re Alexander, 504 N.E.2d 584 (Ind. 1987).

The Supreme Court of Indiana's rationale for disqualifying the entire office when the supervising prosecutor has a conflict has been the fact that a prosecuting attorney "exercises authority and speaks through his deputies" and that the prosecutor has the administrative control over the entire staff. The Indiana courts have found, therefore, the supervisor should not be fully disqualified unless his entire staff was also so disqualified. Tippecanoe, 432 N.E.2d at 1379; State ex rel Goldsmith, 385 N.E.2d at 945.[2]

[2]The United States Court of Appeals for the Seventh Circuit cited to Havens v. Indiana, 793 F.2d 143, 145 (7th Cir. 1986), claiming that there was no Sixth Amendment violation by a prosecutor who had previously represented the defendant when charges were four (4) years apart and unrelated. Note, however, that Havens was not a case of a prosecutor recusing himself and using a subordinate as an institutional screening. There also was no relationship between the prior charges and the present charges that Havens was being prosecuted on. In the case at bar, Goot's present charges were the same charges to which USA Richmond had previously represented Goot.

Other jurisdictions have likewise found that it is inappropriate to use a subordinate as an institutional screening method to insulate a superior of charges of conflict of interest. See, e.g., State v. Dean Foods Products Co., 405 F.2d 380 (8th Cir., 1979); Blair v. Armstrong, 626 F.2d 512 (W.D. Missouri 1985). Even where there is no prejudice shown, the appearance of impropriety necessitates recusal. State v. Cooper, 409 N.E.2d 1070 (Ct of Comm. Pleas, Ohio 1980); See also Satterwite v. State, 357 S.2d 816 (Ala. Ct.App. 1977); Kansas v. Leigh, 178 Kan. 549 289 P.2d 774 (1955).

In People v. Shinkle, 415 N.E.2d 909 (N.Y. 1980), the Court of Appeals of New York reversed a conviction where the attorney who initially represented the defendant was later appointed chief assistant in the office of the prosecutor. Despite screening measures scrupulously used by the office, the court found the insulation insufficient. The court noted that proof of noncompliance with the screening measures was "out

of the defendant's reach" and therefore the inherent impropriety necessitated reversal. Id. at 910.

This position is not endemic to Indiana, Missouri, Ohio, New York and the Eighth Circuit, but is likewise emphasized in a district court opinion in Arizona. Despite the fact that there was no transfer of information, the court in United States v. Catalanotto, 468 F.Supp. 503 (D. Arizona 1978) found that the proper remedy was to disqualify the particular office of the United States Attorney where a conflict existed. The court noted, however, that the matter could still be prosecuted by a different United States Attorney's Office. Id. at 507.

It would appear that this Seventh Circuit decision in United States of America v. Goot, is a decision which takes a position contrary to these aforestated cases. Specifically it is the first case that would appear to find it appropriate to use a subordinate where a superior in the same United States Attorney's Office is excluded as a result of a conflict.

The Seventh Circuit in reaching its result chose to employ a three part test ennunciated in its leading decision of Schiessle v. Stephens, 717 F.2d 417 (7th Cir. 1983). The Seventh Circuit Court of Appeals admits in reviewing the facts of the case at bar with the Schiessle case that "more could have been done." The court likewise admits that it is troubled by some of the items which would give rise to an appearance of impropriety. (Appendix A, p.10). The court, in resolving these issues, finds that the appropriate methodology to be employed on questions of disqualification is to "balance the respective interests of the defendant, the government and the public." See United States v. O'Malley, 786 F.2d 786 (7th Cir. 1986). The United States Court of Appeals acknowledges that Defendant Goot has a fundamental interest in his Fifth Amendment right not to be deprived of liberty without due process of law and in his Sixth Amendment right to counsel. However, the court fails to employ the necessary strict scrutiny standard that is applicable when there is a finding of a fundamental right as provided by

the Sixth Amendment to the United States Constitution. Powell v. Alabama, 287 U.S. 45 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963).

In employing a balancing test, the United States Court of Appeals negates defendant's rights in that the balancing is attempted without a full and complete evidentary hearing. Defendant Goot was denied the opportunity to present evidence, cross-examine witnesses, and receive complete disclosure of the practices in the United States Attorney's office as administered by USA Richmond. The United States Court of Appeals for the Seventh Circuit accepts the rendition of practices as explained by AUSA Milner at oral argument. (Appendix A. p.9). As such, review by this Court is proper to resolve the jurisdictional conflict on supervisor-subordinate disqualification and to likewise provide Defendant Goot with the opportunity to obtain his procedural rights pursuant to the United States Constitution.

II.

IS THE DEFENDANT'S RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT PURSUANT TO THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES VIOLATED WHEN THE MAXIMUM SENTENCE IS IMPOSED AGAINST THE DEFENDANT BY THE COURT AND SAID SENTENCE IS GROSSLY DISPROPORTIONATE TO A MORE CULPABLE CO-DEFENDANT, GROSSLY EXCEEDS OTHER SENTENCES IMPOSED ON SIMILARLY SITUATED DEFENDANTS, GROSSLY EXCEEDS UNENACTED SENTENCING GUIDELINES AND IS IMPOSED WITH NO COMMENT OR RATIONALE GIVEN BY THE TRIAL COURT?

This court should grant the writ in this case to consider and decide whether the Eighth Amendment of the Constitution of the United States is violated when the maximum sentence of twenty (20) years on each of two (2) counts is imposed against a defendant in contrast to similarly situated defendants within the jurisdiction and defendants outside the jurisdiction.

In Solem v. Helm, 463 U.S. 277 (1983), the United States Supreme Court affirmed the Court of Appeals reversal of a sentence which was found to be violative of the Eighth Amendment. Solem prohibits "not only barbaric punishments, but also sentences that are disproportionate to the crime

committed." Id. at 284. Solem provided that proportionality was not limited to death penalty review. Id. at 288. Rather, it was applicable to all felony prison sentences. Id. at 288-290. Solem established a three prong test for review of sentences, that being (1) the gravity of the offense and harshness of penalty, (2) comparison to other criminals in the same jurisdiction, and (3) comparison with other jurisdictions.

In noting this first factor, it is apparent that defendant's sentence of twenty (20) years is in gross excess to the gravity of the offense and is an unduly harsh penalty. Like Solem, defendant's crime involved neither violence nor threat of violence to any person. Id. at 298. Like Solem, defendant was not charged with the mere underlying offense, but rather with an offense similar to Solem's habitual offense. Defendant could have been charged with state court bribery charges, but use of the prosecutor's discretion resulted in RICO charges. Like Solem's recidivist statute, intended to provide greater penalties, RICO was designed to provide greater

offenses to individuals involved with organized crime. Like Solem's habitual offender offense, one cannot consider the offense, racketeering in the abstract. Id. at 296. Rather, it is necessary to look at the underlying offenses to determine the harshness of this penalty.

The underlying offense of Bribery (Indiana Code 35-44-1-1), is a class C felony in the State of Indiana. It carries a penalty of two (2) to eight (8) years and permits suspension of the sentence. (Indiana Code 35-50-2-6). Clearly, defendant's sentence, had he been charged pursuant to state statute, would have permitted him the opportunity to present mitigating circumstances which could have lowered the maximum of eight (8) years in prison. (Indiana Code 35-38-1-7).

The Racketeer Influenced and Corrupt Organization Act was passed to serve as a blueprint to fight organized crime. Statement of Findings and Purpose, Pub. L.No. 91-452, 84 Stat. 922-23 (1970). Although the extension of this act to individuals who have no involvement with organized crime has persisted and been found

acceptable, the imposition of the maximum penalty on each count in such circumstances warrants review. Unlike many offenses, close scrutiny has been afforded sentencing arguments when a RICO violation was involved. See United States v. Busher, 817 F.2d 1409 (9th Cir. 1987). (RICO forfeiture held violative of the Eighth Amendment). A sentence of twenty (20) years to a minor defendant, with no connection to organized crime, no criminal record, and an exemplary background is comparable to Solem v. Helm's sentence of life imprisonment to a defendant for uttering no account check for One Hundred ($100.00) Dollars with an extensive criminal record. Like this Court's findings in Solem, that such a sentence is unduly harsh, Defendant Goot's sentence requires review and reversal as disproportionate to the gravity of the offense.

In noting similar cases of Racketeering within the Seventh Circuit, it is apparent that Defendant Goot's sentence is grossly disproportionate. Numerous comparable defendants have been convicted of charges similar to

Defendant Goot's. In all of these cases, the attorneys received sentences less than Defendant Goot. This is despite the fact that in the vast majority of these cases the charges against the attorney defendants were substantially greater than Defendant Goot's. See. Appendix B. See also. Brief of Appellant. p.32-34.

In comparing defendant's twenty (20) year sentence to similar defendants outside this jurisdiction, a disparity is also seen. Three (3) sources of comparison are appropriate. Although inapplicable to the case at bar, in noting the recently enacted Sentencing Guidelines, defendant would have received a sentence in the range of twelve (12) to thirty-eight (38) months. (Tr., Sentencing hearing, P.6). Likewise, the 1986 United States Department of Justice, Bureau of Justice Statistics, shows that sentences of Racketeering are in the average of 95.8 months. Id. at 356. (Tabs 5.15, 5.16). Defendant's sentence of Two Hundred and Forty (240) months is grossly disproportionate to this mean. Finally, sentences of judges on similar offenses outside

the Seventh Circuit have been substantially lower than Defendant Goot's. See United States v. Brennan, 629 F.Supp. 283 (E.D. NY 1986).

A disparity is also seen in comparing Defendant Goot's sentence with alleged co-conspirator, Nick Morfas. Morfas, a former deputy prosecutor received a four (4) year sentence. In the case at bar, co-defendant Morfas was, by the government's own admission, the more culpable individual. The government prosecutor, in his closing argument, stated that, "Morfas is just as bad, if not worse, than Goot." Tr., p.1545. Morfas was the prosecutor, the recipient of the funds, and the individual who forged Defendant Goot's name and client's name to various court records. In some cases the clients were those of co-conspirator Morfas and had no knowledge as to who Defendant Goot even was. (Tr., pp. 934-5, 944-5, 950). While Morfas was a necessary element to fruition of these offenses, it would have been impossible for Defendant Goot to have committed any alleged crime without the presence of Morfas. Defendant Goot, unlike Morfas, was a mere

practicing attorney and not a public official. Defendant Goot, unlike Morfas, was not the instigator of any crimes. Even if one were to believe the government's own evidence, Defendant Goot was at best, a tool, used by Morfas to effectuate his unlawful fixing of traffic tickets. As such, the disparity in Morfas' receipt of a sentence of four (4) years and Goot's sentence of twenty (20) years, shows the excessive punishment rendered to Defendant Goot for exercising his Sixth Amendment right to jury trial.

The trial judge in the case at bar, failed to explain his rationale for sentencing. Although said rationale is mandated by the new sentencing act, 18 U.S.C.§ 3553(c), it was not necessitated by prior Seventh Circuit rules. See, e.g., Andrews v. United States, 817 F.2d 1277, (7th Cir. 1987); United States v. Gomer, 764 F.2d. 1221 (7th Cir. 1985). This posture is contrary to the Second Circuit which remanded a sentence imposed prior to the enactment of the new sentencing act, which failed to specify the rationale for the imposition of the sentence. See United States v. Golumb, 754

F.2d 86 (2nd Cir. 1985). The United States Court of Appeals for the Second Circuit has taken a position in contrast to the Seventh Circuit, that a failure to specify reasons was grounds for a remand where there is a possibility that the sentence was augmented as a result of the defendant's decision to stand trial as opposed to pleading guilty. See United States v. Hutchins, 757 F.2d 11 (2nd Cir. 1985).

The United States Court of Appeals for the Seventh Circuit notes that it is an unwise practice to fail to explain to a defendant why a term of sentence is being imposed. (Appendix A, p.14). However, the Seventh Circuit has chosen in this case, as well as in its prior decisions, not to employ the standard of the Second Circuit of remanding a case in order to obtain an explanation of the court's sentencing rationale. This Court should accept and review this case in order to resolve this procedural disparity of these circuits as to the necessity of granting a remand where a trial court fails to explain its rationale on sentencing and said sentence is imposed prior

to the effective date of the new sentencing act. 18 U.S.C. § 3553(c).

CONCLUSION

For all of the foregoing reasons, this Petition for Certiorari should be granted. As to Question One, Petitioner requests that Defendant's conviction should be reversed and the Indictment dismissed, or in the alternative, the matter should be remanded for a hearing on Defendant's Motion to Disqualify the United States Attorney's Office and retrial or dismissal should be granted as a result thereof. As to Question Two, Petitioner's sentence should be set aside and Defendant resentenced by an impartial magistrate.

Respectfully submitted,

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to the effective date of the new sentencing act. 18 U.S.C. § 3553(c).

CONCLUSION

For all of the foregoing reasons, this Petition for Certiorari should be granted. As to Question One, Petitioner requests that Defendant's conviction should be reversed and the Indictment dismissed, or in the alternative, the matter should be remanded for a hearing on Defendant's Motion to Disqualify the United States Attorney's Office and retrial or dismissal should be granted as a result thereof. As to Question Two, Petitioner's sentence should be set aside and Defendant resentenced by an impartial magistrate.

Respectfully submitted,

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Appendix A - Court's Decision.....A-1 - A-18

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In the

United States Court of Appeals

For the Seventh Circuit

No. 88-2179

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STEPHEN GOOT,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division.
No. 87-CR-110—**James T. Moody**, *Judge.*

ARGUED MARCH 28, 1989—DECIDED JANUARY 24, 1990

Before CUDAHY and MANION, *Circuit Judges*, and HENLEY, *Senior Circuit Judge.**

HENLEY, *Senior Circuit Judge.* This case involves the criminal conviction of an attorney, Stephen Goot, on a two-count indictment, for "fixing" driving-under-the-influence (DUI) cases. One count, under what is commonly called the RICO statute, was for racketeering and the other was a corresponding conspiracy count. *See* 18 U.S.C. § 1962(c)

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* The Honorable J. Smith Henley, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

& (d). For reversal, Goot argues the district court[1] erred in (1) refusing to disqualify the United States Attorney's office; (2) refusing to grant a hearing on the disqualification issue; (3) imposing an improper sentence; (4) excluding impeachment testimony; (5) admitting testimony of others' convictions; (6) denying a motion for acquittal based upon various aspects of the evidentiary proof of a RICO violation; (7) instructing the jury that the Lake County prosecutor's office can be an "enterprise"; and (8) refusing to instruct the jury on the definition of reasonable doubt.

In early 1984 Goot discovered that he was a suspect in Operation Bar-Tab, a federal investigation of the fixing of drunk driving cases in Lake County, Indiana.[2] On April 16, 1984 Goot hired attorney James Richmond to represent him in his defense. Richmond remained Goot's attorney until August, 1985 when Richmond was appointed as the new United States Attorney for the Northern District of Indiana, where Goot was prosecuted.

On October 20, 1987 a grand jury returned an indictment against Goot on both counts.[3] The principal official with whom Goot interacted and conspired was deputy prosecutor Nick Morfas. Goot pleaded not guilty and went to trial; Morfas pleaded guilty and testified against Goot.

The evidence at trial revealed the typical method of operation between Goot and Morfas. A prospective client

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[1] The Honorable James T. Moody, United States District Judge for the Northern District of Indiana.

[2] Operation Bar-Tab has resulted in the conviction of two judges, one judge pro tempore, the Lake County Clerk, two bailiffs, a deputy prosecutor (Goot's codefendant Nick Morfas), and a number of attorneys. A second investigation, Operation Lights-Out, has resulted in the convictions, thus far, of the county sheriff, assessor, two commissioners, and several lesser officials.

[3] The five-year statute of limitations, *see* 18 U.S.C. § 3282, would have run on seven of the eleven predicate acts in Count One within two weeks after the indictment was returned. Two of the remaining four acts already were barred.

would come to Goot after having been arrested and jailed for DUI, and freed by the posting of a cash bond. The defendant would agree to a price for Goot's legal services, with part of the fee to be paid by the bond money. To this end, Goot's new client would give him the bond receipt. Goot then would enter an appearance for his client and file a motion to dismiss pursuant to *Watt v. State*, 249 Ind. 674, 234 N.E.2d 471 (1968).[4]

After filing a *Watt* motion, Goot would inform Morfas about the case and Morfas would steal and destroy the prosecutor's file. Sometimes Morfas would steal and destroy the court's file as well. Once the time for refiling had passed without any further action taken by the prosecutor, Goot would file a second motion to dismiss, which would be granted.[5] A check then would be issued by the prosecutor's office to Goot, the holder of the bond receipt, but payable to the person who initially posted the bond. Goot would give this check to Morfas who would forge the payee's signature and retain the funds as his share in the scheme.

In some cases, Morfas would represent himself to DUI defendants as an attorney, sign Goot's name to the paper

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[4] In *Watt*, the Indiana Supreme Court held that the practice of issuing a traffic ticket was insufficient as a form of charging an offender with a DUI offense under Indiana law, 234 N.E.2d at 474. Thereafter, defense attorneys began filing "*Watt* motions" to dismiss the DUI cases in which only a ticket had been issued. Courts would grant these motions with the condition that the prosecutor refile the cases using an information or affidavit within a thirty to sixty-day period, depending upon the given case. If the prosecutor did not refile on a given case within the allotted time, a second motion to dismiss would be filed and would be granted, dismissing the case outright. Approximately 10% of cases in which *Watt* motions were filed were dismissed.

[5] Evidence admitted at trial indicates that the prosecutor's office and apparently the court system were in such a state of disarray that no one knew why there was a failure to prosecute a given case within the specified period.

work or have Goot sign his name, and then steal the files and collect the fees. Morfas needed to use Goot's name because he could not use his own, being a deputy prosecutor. As a quid pro quo, Morfas either would help Goot with one of Goot's cases or would pay Goot a share of the fees.

The jury found Goot guilty on both counts and he was sentenced to two concurrent twenty-year prison terms (the statutory maximum on each count) and a $25,000.00 fine. Morfas, who was sentenced later, got four years and a $6000.00 fine.

I. Motion to Disqualify

In December, 1987, shortly after the indictment was returned, Goot filed a timely pretrial motion to disqualify the United States Attorney's Office on the grounds that his fifth amendment right to due process and his sixth amendment right to counsel were violated by the prior representation by Richmond. In resisting Goot's motion, the government pointed out that on August 19, 1985, seven days before taking office, Richmond wrote a letter to Assistant United States Attorney Andrew Baker stating that Richmond would recuse himself on all cases in which Richmond had a prior representation, including Goot's. The next day, August 20, Baker advised the Department of Justice of Richmond's recusal. All Assistant United States Attorneys in the Northern District office also were advised of Richmond's recusal. Upon the taking of office, Richmond appointed Assistant United States Attorney John Hoehner to be "Acting United States Attorney" on the Goot investigation. The government also provided to the district court affidavits from Richmond and the Assistant United States Attorneys involved in Goot's prosecution stating that no communications with Richmond had taken place with respect to this prosecution.

In refusing to disqualify the United States Attorney's office, the district court heavily relied on Rule 1.11(c) of

the Indiana Rules of Professional Conduct (IRPC), the set of ethical rules in effect at the time.[6] Rule 1.11(c) reads in pertinent part: "[A] lawyer serving as a public officer or employee shall not . . . participate in a matter in which the lawyer participated personally and substantially while in private practice . . . ." The comment to this paragraph states that the rule "does not disqualify other lawyers in the agency with which the lawyer in question has become associated." The district court concluded that since other lawyers in the agency could participate, recusal of the entire Northern District office was not necessary. Juxtaposing this conclusion with the screening measures employed by the office, the district court denied Goot's motion. It also denied a request for a hearing on the motion on the ground that a hearing would only be for the purpose of "going fishing."

Goot argues that the district court erred in relying on the IRPC and that it should have relied on the Indiana Code of Professional Responsibility (ICPR), because the IRPC only superseded the ICPR on January 1, 1987—prior to Goot's motion to disqualify, but long after the important facts of this case arose. Specifically, Goot argues that Canons 4 ("A lawyer should preserve the confidences and secrets of a client") and 9 ("A lawyer should avoid even the appearance of professional impropriety") of the ICPR required disqualification of the Northern District office.

For purposes of this case, we discern no real difference between the IRPC and the ICPR. Both either state or imply the ethical principle prohibiting conflicts of interest or even the appearance of one, and neither answers the question whether that principle was violated here. While in general the Indiana Supreme Court has relied upon its ethical rules in requiring complete office recusal in criminal cases, we observe that this court at times has dis-

[6] The district court's local Rule 1(f) provided for adoption of state rules for governing the ethical conduct of attorneys.

tinguished between what may be inappropriate ethical conduct for a prosecutor and what may be a constitutional violation. *Compare State v. Tippecanoe County Court*, 432 N.E.2d 1377, 1379 (Ind. 1982) (holding that when the elected prosecutor and not just one of his deputies is disqualified, the entire office must be disqualified) *with Havens v. Indiana*, 793 F.2d 143, 145 (7th Cir.) (finding no sixth amendment violation by prosecutor, who had previously represented the defendant, when charges were four years apart and were unrelated, but nevertheless, chastising the government's ethical decision not to recuse the prosecutor anyway), *cert. denied*, 479 U.S. 935 (1986). Even so, with the added weight of the constitutional right to counsel of choice in a criminal case, the ethical considerations are basically the same and both the district court and this court have a duty to supervise ethical conduct of attorneys. While ethical codes per se may not be dispositive of the outcome of a criminal case, when an actual conflict of interest exists we must examine and weigh the circumstances of the particular case. *See United States v. O'Malley*, 786 F.2d 786, 789-90 (7th Cir. 1986).

The government points out that the Attorney General, as statutorily mandated, *see* 28 U.S.C. § 528,[7] had promulgated rules on recusal and that the procedure followed in this case strictly complied with those rules. *See* United States Attorney's Manual § 1-3.515 ("U. S. Attorney who recuses should promptly notify the appropriate division and . . . the Executive Office for the U. S. Attorneys. In exceptional cases, the recusation of the U. S. Attorney

[7] 28 U.S.C. § 528 states:

> The Attorney General [of the United States] shall promulgate rules and regulations which require the disqualification of any officer or employee of the [United States] Department of Justice, including a United States attorney or a member of such attorney's staff, from participation in a particular investigation or prosecution if such participation may result in a personal, financial, or political conflict of interest, or the appearance thereof. . . .

may require the recusation of all members of that office."); *see also* 28 C.F.R. § 0.131 (1988) ("Each U. S. Attorney is authorized to designate any Assistant U. S. Attorney in his office to perform the functions and duties of the U. S. Attorney . . . with respect to any matter from which he has recused himself . . . ."). Finally, an affidavit by Manual Rodriguez, Legal Counsel, Executive Office for the United States Attorneys, asserts that based upon a thorough review of the case, recusal of the entire Northern District staff was deemed unnecessary.

The government's adherence to its standardized procedure and its conductance of an internal review on this issue is commendable and helpful, but it, of course, is not dispositive. The question whether Goot's rights were violated is not left for his adversary to determine, but is for a court of law. We now turn to that determination.

This circuit employs a three-part sequential inquiry in deciding the question whether disqualification of an office is necessary when an attorney has switched from one side to another. *Schiessle v. Stephens*, 717 F.2d 417, 420-21 (7th Cir. 1983).[8] First, does a "substantial relationship" exist between the subject matter of the prior and present representations? Second, if so, has the presumption of shared confidences with respect to the prior representation been rebutted? Third, if not, has the presumption of shared confidences with respect to the present representation been rebutted? *Id.*

The government concedes the first two points: Goot alleges, and Richmond admits, that confidential informa-

[8] The *O'Malley* court declined to employ civil cases in determining the question whether a defense attorney should be disqualified in a criminal case. *O'Malley*, 786 F.2d at 790. However, *O'Malley* was not a case about the effectiveness of screening devices. Rather, the disqualified attorney in *O'Malley* represented both the defendant and a key prosecution witness simultaneously. To the extent that the issue in a criminal case involves the effectiveness of screening an "infected" attorney, the civil cases may provide some useful guidelines.

tion was communicated between them. It is only the third point that is in issue. The government argues that it erected "Chinese walls" between Richmond and the prosecution of this case by Richmond's appointment of Hoehner as the Acting United States Attorney, as verified by affidavits asserting that no secrets were disclosed. Goot argues that the appointment of one's assistant in the same office does not rebut the presumption that confidences were shared.

Indeed, "[a] very strict standard of proof must be applied to the rebuttal of this presumption . . . and any doubts as to the existence of an asserted conflict must be resolved in favor of disqualification." *LaSalle Nat. Bank v. County of Lake*, 703 F.2d 252, 257 (7th Cir. 1983). However, the office under review can rebut the presumption by submitting "objective and verifiable evidence," *Schiessle*, 717 F.2d at 421, which shows that "specific institutional mechanisms" have sufficiently screened the "infected" attorney. *LaSalle Nat. Bank*, 703 F.2d at 259.

The predominant theme running through this court's prior decisions is that disqualification is required when screening devices were not employed or were not timely employed. *See Schiessle*, 717 F.2d at 421; *Analytica, Inc. v. NPD Research*, 708 F.2d 1263, 1268 (7th Cir. 1983);[9] *see also LaSalle Nat. Bank*, 703 F.2d at 259 ("screening arrangements were not established until the disqualification motion was filed"). Here, as indicated, screening began before

[9] The *Analytica* court held that when an entire law firm switches from one side to another and a substantial relationship exists between the prior and present representations, an irrebutable presumption arises that confidences were shared. *Analytica*, 703 F.2d at 1268. In such a case, no measure of screening mechanisms could cleanse the taint and disqualification is required. *Id.*

Analytica may be distinguished from the case *sub judice*. Here, the record shows that Richmond's former firm, Goldsmith, Goodman, Ball & Vanbokkelen continued to represent Goot throughout his trial and appeal. Moreover, Richmond comprises only one prosecutor at the United States Attorney's office, albeit its chief.

Richmond took office and culminated with the appointment of Hoehner. The screening mechanisms employed were in accordance with established institutional procedure. Thus, the facts of this case are very different from those of the cited cases which required disqualification.

More specifically, the attorneys of the office were instructed on Richmond's recusal, thus preventing any discussion with him about the case. *LaSalle Nat. Bank*, 703 F.2d at 259. By his recusal, Richmond was prohibited from access to the files on this case. *Schiessle*, 717 F.2d at 421. "[B]oth the disqualified attorney and others in [the office] affirmed these facts under oath," *LaSalle Nat. Bank*, 703 F.2d at 259; and, moreover, the office instituted the screening mechanisms as soon as the "disqualifying event occurred." *Id.*

We agree with Goot that more could have been done. During oral arguments the government conceded that the case files conceivably could have been accessed by the United States Attorney at night or on weekends. The practice of maintaining locked case files with keys distributed to a select few has been cited previously by this court as a substantial screening mechanism. *Id.* Likewise, the codes necessary to access pertinent information on electronic hardware must remain secret. Nevertheless, the absence of one or both of these mechanisms would not render infirm the screening mechanisms employed in this case.

Goot argues that there are several indications that Richmond was not screened. First, materials filed with the court were submitted in the name of James Richmond, United States Attorney, but signed by John Hoehner, *Assistant* United States Attorney. Second, some materials submitted by the government are in the name of Richmond, as above, but signed by Assistant United States Attorney Kevin Milner. Hoehner's name does not appear on these latter materials. Finally, Goot points out that Assistant United States Attorney James Meyer's affidavit, submitted in resistance to Goot's motion to disqualify,

stated "In this respect, Mr. Richmond told me that he had recused himself in all aspects of the 'Bar-Tab Investigation,' " but that a government information submitted to the same court below against another Operation Bar-Tab defendant was personally signed by Richmond, the implication being that Richmond indeed was involved in Operation Bar-Tab.

We address each point in tandem. As is common in busy legal and lay offices, the paper supply is preprinted and the word processors are preprogrammed to include certain information that always appears on formal documents (*e.g.*, a law firm's letterhead). During oral arguments the government explained that Richmond's name is preprinted on various forms that are used daily by the staff. We conclude that the government's failure to remove Richmond's preprinted name should not be construed as more than clerical inattention on its part. We suggest closer attention.

Likewise, the appearance of Milner's name, instead of Hoehner's, is hardly surprising. The record shows that Milner tried the case below and he, in fact, argued the appeal before this panel. We note that Hoehner's appointment as Acting United States Attorney with respect to Goot's case did not mean Hoehner had to proceed in its prosecution without the assistance of his subordinates.

We are more troubled by Goot's third point. A fair reading of Meyer's affidavit suggests that the term "In this respect" refers to Richmond's recusal on the Goot case specifically, and not to a recusal on Operation Bar-Tab in *every* respect. As such, there is no implication of prejudice to this defendant. *See United States v. Caggiano*, 660 F.2d 184, 188 (6th Cir. 1981), *cert. denied*, 454 U.S. 1149 (1982). Richmond's own affidavit supports this conclusion. Nevertheless, there is some ambiguity with this wording, and a notion that Richmond was involved in Operation Bar-Tab at all could give rise to an appearance of impropriety. We note, however, that Operation Bar-Tab was a large investigation. *See supra* n.2. The rec-

ord indicates that the Operation Bar-Tab defendant against whom Richmond signed an information was not a codefendant of Goot. Goot does not allege otherwise. Thus, we reject as dispositive Goot's argument that there are indications Richmond was not screened.

In deciding questions of disqualification we balance the respective interests of the defendant, the government, and the public. *O'Malley*, 786 F.2d at 790. Goot has a fundamental interest in his fifth amendment right not to be deprived of liberty without due process of law and in his sixth amendment right to counsel. *See id.* The government has an interest in fulfilling its public protection function. To that end, the convenience of utilizing the office situated in the *locus criminis* is not lightly to be discarded. Furthermore, the government has a legitimate interest in attracting qualified lawyers to its service. *LaSalle Nat. Bank*, 703 F.2d at 258.

However, we also note that not unfavorable to Goot is the government's interest in sustaining public confidence in its high level of integrity by dealing fairly, both in fact and in appearance, with criminal defendants. The public has an interest in assuring that government is not corrupt and that public officials, officers of the court such as Goot, and others who are responsible for corrupting government are fairly and promptly tried for their alleged crimes. Balancing these interests, and despite some disquieting aspects of the record, we hold that the measures employed by the government sufficiently screened Richmond from the prosecution of Goot so that each and every particular interest of Goot, the government, and the public was met.

II. Request for a Hearing

Goot argues that the district court erred in not granting him a hearing on the disqualification issue. An evidentiary hearing on recusal is useful but not always required. *See United States v. O'Malley*, 786 F.2d at 793 (upholding the disqualification of criminal defendant's counsel who

had previously represented a key government witness). Goot does not make a substantial showing that any actual disclosure took place or that he was prejudiced in any way. Furthermore, the record shows that the issue was well-briefed by both sides. Nevertheless, Goot claims that a hearing was required because procedural irregularities occurred in that the prosecutor's office of the Northern District first recused itself, but later reversed that decision and resumed the prosecutor's role.

The record shows that the government sought to disqualify Richmond's former firm from its representation of Barry Sherman, a key witness in this case and Goot's former law partner. For this purpose only, the Justice Department appointed Assistant United States Attorney for the Southern District of Indiana, David Ryan. In pursuing the disqualification of Sherman's counsel, Ryan had to question the propriety of the same firm's representation of Goot. By using Ryan for this purpose, the Northern District was not required to question the propriety of its own chief's prior acts when he represented Goot. We, therefore, agree with the district court that the Northern District's recusal in moving to disqualify Sherman's counsel was irrelevant to the question whether the Northern District should have recused itself with respect to the Goot prosecution.[10]

III. Disproportionate Sentence

Goot argues that he received a harsher sentence than his more culpable codefendant, Nick Morfas, and relies in part on *Solem v. Helm*, 463 U.S. 277 (1983), which holds that in some circumstances sentences that are disproportionate to the crime may be in violation of the eighth amendment.

[10] Other irregularities cited by Goot as requiring an evidentiary hearing were not presented to the district court, but we, nevertheless, have addressed them elsewhere in this opinion.

In general, it may be said that district courts are given broad discretion in sentencing and that absent an abuse of that discretion the sentence will not be overturned on appeal. *United States v. Cardi*, 519 F.2d 309, 311-12 (7th Cir. 1975). Successful challenges to the proportionality of particular sentences shoud be "exceedingly rare." *Hutto v. Davis*, 454 U.S. 370, 374 (1982). Indeed, a sentence that falls within statutory limits generally will not be overturned. *United States v. Tucker*, 404 U.S. 443, 447 (1972). The sentences imposed here were the maximum in each case but fell within statutory limits.

The district court, however, must avoid not exercising "any discretion at all in imposing the sentence." *United States v. Griffin*, 827 F.2d 1108, 1118 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 1085 (1988). "[W]here the facts appearing in the record point convincingly to the conclusion that the district court has, without any justification, arbitrarily singled out a minor defendant for the imposition of a more severe sentence than that imposed upon the co-defendants, this court will not hesitate to correct the disparity." *United States v. Wiley*, 278 F.2d 500, 503 (7th Cir. 1960); *see also United States v. Ely*, 719 F.2d 902, 907 (7th Cir. 1983) (when a judge "sentences similar offenders to greatly disparate terms for the same crime, without any explanation, an inference arises that he failed to exercise his discretion"), *cert. denied*, 465 U.S. 1037 (1984).

In this case, the district court did not give its reasons for imposing the statutory maximum.[11] The government notes that without help from Morfas they would not have been able to convict Goot. The government also reasons that while the district court did not give its reasons when

[11] The sentencing transcript reflects that, prior to the court's rendering the sentence, Goot's attorney requested the court to explain any imposition of sentence greater than what the new Sentencing Guidelines would have required were they effective at the time with respect to this case. Goot's attorney estimated a prison term of between 12 and 38 months under the Guidelines.

sentencing Goot, it likely adopted the arguments made by the government during the sentencing hearing. Finally, during oral argument the government assured this court that as a standard practice it always asks for the statutory maximum in RICO violations and that Goot was not singled out for a stiff sentence for going to trial. Goot asserts that he was less culpable than Morfas who received a total of four years. Morfas was a public official who stole and destroyed records, forged signatures, and was at the center of the operation. Without him, Goot could not have committed the crime, but Morfas, who was able to obtain clients of his own, conceivably could have committed the crime without Goot. Goot urges that *Wiley* therefore requires reversal of the sentence.

A district court always should tell a defendant why a term is being imposed. Indeed, if the criminal acts in this case took place today, the sentencing court would be required to "state in open court the reasons for its imposition of the particular sentence. . . ." 18 U.S.C. § 3553(c). But required or not, the practice is wise.

Nevertheless, we note that in *Wiley* the defendant was sentenced only four days before his equally culpable and more culpable codefendants. *Wiley*, 278 F.2d at 501. In the present case, Goot was sentenced approximately one month before Morfas. We are unwilling to impose on the district court a duty of anticipating the reasons for sentencing it will state when it has a codefendant before it. Such a rule would impose an onerous burden upon the district judge. Goot's sentence, as the government's argument at the sentencing hearing reveals, is comparable to the 15-year and 20-year sentences imposed on two other Operation Bar-Tab defendants. Furthermore, it is possible that Goot's sentence is not too long, but Morfas's is too short.[12] In

[12] Goot's sentence appears to be somewhat longer and Morfas's shorter than sentences imposed on some judges who have accepted bribes. *See United States v. Brennan*, 629 F. Supp. 283 (E.D.N.Y.

(Footnote continued on following page)

present circumstances, we hold that Goot's sentence is within the statutory range and its imposition was not shown to be either an abuse of discretion or constitutionally disproportionate.

However, what we hold with respect to length of sentence is not to be considered as prejudicial to any adjustment that is due. The offenses committed in this case took place prior to November 1, 1987. Thus, under the version of Rule 35(b) of the Federal Rules of Criminal Procedure in effect for this case,[13] Goot may move for a reduction of his sentence, and if such a motion is timely filed we are confident that the district court will consider it with an open mind and adjust the sentence if persuaded that the circumstances call for a reduction. *Cf. United States v. Turner*, 864 F.2d 1394, 1401 (7th Cir. 1989) (per curiam).

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[12] *continued*

1986) (Weinstein, J.) (sentencing state court judge to two consecutive five-year sentences for acceptance of numerous bribes over the course of many years); *id.* at 301 (noting trend of ten-to-fifteen year sentences for judges convicted in Greylord prosecutions in the Northern District of Illinois). The conduct of a judge or other public official who joins in a bribery scheme, and thus abuses the public trust by allowing the judicial process to be corrupted, might be considered at least as reprehensible as the conduct of an attorney engaging in similar conduct.

[13] Rule 35(b) reads:

> **Reduction of Sentence.** A motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. . . .

Fed. R. Crim. P. 35(b), Rule Applicable to Offenses Committed Prior to Nov. 1, 1987. The current version of Rule 35, effective for cases in which offenses were committed on or after November 1, 1987, does not allow a defendant to seek a reduction of sentence. *See* Fed. R. Crim. P. 35 (as amended by Pub. L. 98-473).

IV. Refusal to Allow Goot to Present a Witness

Goot argues that the district court erred in sustaining an objection that prevented him from putting a witness on the stand who would have testified that he gave Morfas $3000.00 for fixing his DUI case, not $1000.00 as Morfas had testified on cross-examination. However, "[t]he rule in this circuit is that a witness may not be impeached by contradiction as to collateral matters elicited on cross-examination." *United States v. Rovetuso*, 768 F.2d 809, 817 (7th Cir. 1985), *cert. denied*, 474 U.S. 1076 (1986); *see also* Fed. R. Evid. 608(b).

V. Admission of Prejudicial Testimony

Goot next argues that the district court erred in allowing witnesses to testify about the convictions of judges in fixing DUI cases, because such testimony prejudiced the jury against him. This testimony was elicited in response to Goot's having implied on cross-examination that the judges would have noticed any alleged improprieties. The judges' convictions were brought out in redirect examination to show that Morfas and Goot had the opportunity to perpetrate their crimes because of the general climate of corruption in the Lake County court system. We hold that the admission of this testimony was within the district court's discretion. *United States v. Serlin*, 707 F.2d 953, 959 (7th Cir. 1983).

VI. Sufficiency of Evidence

Goot argues that the district court erred in denying his motion for acquittal in that there was insufficient evidence to prove the underlying predicate acts to sustain a RICO violation or to show a nexus with the "enterprise."

To sustain a RICO violation the government had to prove at least two predicate acts. Predicate acts one through nine were based on bribing a public official in violation of the Indiana Bribery Act. *See* Ind. Code § 35-44-1-1(a)(1). Acts ten and eleven were based on Goot's taking a bribe,

the theory being Goot aided Morfas in getting bribes in violation of the same Act. *See id.* § 35-44-1-1(a)(2); *see also id.* § 35-41-2-4 ("A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense . . . ."). Allowing the government all reasonable inferences from the evidence, we conclude that a rational jury could have found Goot guilty. *United States v. Garner*, 837 F.2d 1404, 1422 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 2022 (1988).

Furthermore, although Goot asserts that his alleged acts affected his clients only and not the prosecutor's office, by bribing Morfas to steal the prosecutor's files Goot rendered it virtually impossible to prosecute Goot's clients. Thus, we hold that the government proved that the predicate acts had an effect on the "enterprise," the Lake County Prosecutor's Office. *See United States v. Yonan*, 800 F.2d 164, 167 (7th Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987). We conclude that the district court did not err in denying Goot's motions for acquittal.

VII. The Prosecutor's Office as an "Enterprise"

Next, Goot argues that the district court erred by instructing the jury that the prosecutor's office can be an "enterprise" for RICO purposes. However, this argument already has been foreclosed, *see, e.g., Yonan*, 800 F.2d at 167, and we decline Goot's invitation to reconsider this precedent.

VIII. Requested Instruction on "Reasonable Doubt"

Since the filing of appellant's brief, the United States Supreme Court denied a petition for a writ of certiorari to review the decision in *United States v. Littlefield*, 840 F.2d 143 (1st Cir.), *cert. denied*, 109 S. Ct. 155 (1988). Consequently, in his reply brief, Goot has abandoned his last argument that the court erred in not appropriately instructing the jury on the definition of "reasonable doubt." *See, e.g., United States v. Glass*, 846 F.2d 386, 387 (7th Cir. 1988).

As indicated, without prejudice to such modification, if any, as may result from a timely filing of a motion for reduction of sentence under Fed. R. Crim. P. 35, the judgment of the district court is affirmed.

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Appendix B

From J. Tuohy and R. Warden, GREYLORD: JUSTICE CHICAGO STYLE (1989)

OPERATION GREYLORD-CONVICTED ATTORNEYS
AS OF JUNE 1, 1988

Defendant	Position	Conviction	Sentence
Hugo Arquillo	Attorney	Pleaded guilty Dec. 16, 1987 to two tax counts.	2 months work release, $1,300 fine, 3 years probation 200 hours community service
Lee Barnett	Attorney	Pleaded guilty Jan. 15, 1987, to one racketeering/conspiracy count and one mail fraud count.	6 months prison, 2 years probation
Lebert D. Bastianoni	Attorney	Pleaded guilty July 6, 1987, to two tax counts	30 days work release $5,000 fine, 4 years probation, 500 hours community service, ordered to pay back taxes and penalties

Harlan Becker	Attorney	Convicted Feb. 17, 1987, on two tax counts. Pleaded guilty Nov. 6, 1987, to one racketeering/conspiracy count and one racketeering/bribery count.	6 years prison, $60,000 fine, 5 years probation, ordered to pay $63,000 in back taxes and penalties
Jerry B. Berliant	Attorney	Pleaded guilty April 15, 1985, to three tax counts	20 weekends in jail, 3 years probation
Neal Birnbaum	Attorney	Pleaded guilty Oct. 14, 1987, to one racketeering/conspiracy count, one racketeering/bribery count, and one mail fraud count	(Sentencing pending)
Dale Botan	Attorney	Pleaded guilty Mar. 23, 1988, to four misdemeanor tax counts for failure to income tax returns.	(Sentencing pending)
Howard M. Brandstein	Attorney	Pleaded guilty Sept. 19, 1986, to one racketeering/conspiracy count and one tax count.	1 year and one day prison, $56,000 forfeiture 5 years

			probation 200 hours community service
Houston Burnside	Attorney	Pleaded guilty June 5, 1985, to three tax counts.	30 weekends in prison, $3,000 fine 3 years probation
Bruce L. Campbell, Jr.	Attorney	Pleaded guilty Feb. 4, 1987, to one racketeering/bribery count and tax count.	1 year prison, 6 months of which is work release; 5 years probation
James I. Canoff	Ass't. Corporation Counsel	Pleaded guilty April 17, 1984, to one racketeering/bribery count, 18 mail fraud counts, and one obstruction of justice count.	6 months work release, 300 hours community service, $5,000 restitution to the City of Chicago
James J. Costello	Attorney	Pleaded guilty July 18, 1985, to one racketeering/bribery count and one mail fraud count.	8 years prison, $100, fine 5 years probation

Robert Daniels	Attorney	Convicted Feb. 17, 1987, on two tax counts Pending trial on one racketeering/bribery count and one racketeering/ conspiracy count.	6 years prison
Vincent E. Davino	Attorney	Pleaded guilty Jan. 16, 1987, to one racketeering/ conspiracy count and one mail fraud count.	4 years, 5 years probation 500 hours community service
Thomas M. Del Beccaro	Attorney	Pleaded guilty April 11, 1986, to two mail fraud counts.	90 days in prison, later revoked; $1,000 fine; 5 years probation
Thurman Gardner	Attorney	Pleaded guilty April 1, 1985, to four tax counts	6 months prison, 3 years probation, 750 hours community service
Richard H. Goldstein	Attorney	Pleaded guilty Feb. 4, 1987, to one racketeering/conspiracy count and one tax	1 year prison, 4 months of which is work release; 5

		count.	years probation; 400 hours community service
Alphonse C. Gonzales	Attorney	Pleaded guilty, June 25, 1986, to two tax counts and on July 8, 1986, to one extortion count.	3 years prison, later reduced to 1 year; $2,000 fine; 5 years probation, 400-hours community service
William H. Kampenga	Attorney	Pleaded guilty Mar. 23, 1988, to two tax counts	(Sentencing pending)
Melvin Lanter	Attorney	Pleaded guilty Dec. 17, 1986, to one racketeering/bribery count.	90 days work release, $25,000 fine, 5 years probation, 400 hours community service
Edward Kaplan	Attorney	Pleaded guilty Jan. 28, 1985, to three tax counts.	2 years prison, 5 years probation

Paul G. Kulavski	Attorney	Pleaded guilty March 18, 1985, to two tax counts	3 months prison, 5 years probation, 400 hours community service
Bernard N. Mann	Attorney	Pleaded guilty Feb. 25, 1987, to one racketeering/bribery count and one tax count.	6 months prison, $25,000 fine, 5 years probation, 400 hours community service
Joseph F. McDermott	Attorney	Pleaded guilty Dec. 10, 1986, to one racketeering/bribery count and one tax count	1 year and one day prison, $30,000 fine, 5 years probation
Ralph E. Mecvk	Attorney	Pleaded guilty July 6, 1987, to two tax counts.	30 days work release, $5,000 fine, 4 years probation, 500 hours community service, ordered to pay back taxes and penalties
Jay I. Messinger	Attorney	Convicted May 8, 1984, on one mail fraud count.	2 years prison, $1,000 fine

James E. Noland	Attorney	Pleaded guilty March 27, 1987, to one racketeering/bribery count and one tax count.	15 months prison, $15,000 fine, 5 years probation, 400 hours community service
Edward E. Nydam	Attorney	Pleaded guilty April 29, 1985 to two tax counts and on Feb. 25, 1986, to one mail fraud count.	6 months prison, 5 years probation (on tax counts only)
James L. Oakey	Attorney, Former Associate	Convicted May 15, 1987, on two tax counts. Pending trial one racketeering/ bribery count and one racketeering/ conspiracy count.	18 months prison, $5,000 fine, 5 years probation, ordered to pay back taxes and penalties
William F. Reilly	Attorney	Pleaded guilty March 27, 1987, to one racketeering/bribery count and one tax count.	14 months prison, $5,000 fine, 5 years probation, 400 hours community service

Bruce Roth	Attorney	Convicted Aug. 24, 1987, on two extortion counts, one racketeering/ bribery count, and one racketeering/conspiracy count.	10 years prison, 5 years probation
Martin Schachter	Attorney	Pleaded guilty July 5, 1986, to one mail fraud count.	4 years probation
R. Frederic Solomon	Attorney	Pleaded guilty April 8, 1986, to four tax counts.	2 1/2 years prison, 5 years probation
Dean S. Wolfson	Attorney	Pleaded guilty Jan. 25, 1985, to one racketeering/bribery count and three mail fraud counts.	7 1/2 years prison, $3,000 fine, 5 years probation
Cyrus Yonan, Jr.	Attorney	Pleaded guilty May 14, 1987, to one racketeering/bribery count and two tax counts.	1 year and one day prison, $15,000 fine, 3 years probation, 400 hours community service ordered to pay $12,300 in back taxes and penalties

Arthur Zimmerman	Attorney.	Pleaded guilty Dec. 22. 1987. to two to counts.	3 years prison. $10.000 fine. 4 years probation. 300 hours community service

(2)

No. 89-1656

Supreme Court, U.S.
FILED
JUN 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

STEVEN GOOT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

EDWARD S. G. DENNIS, JR.
Assistant Attorney General

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QUESTIONS PRESENTED

1. Whether the Fifth or Sixth Amendment of the Constitution required that all attorneys in the United States Attorney's office be disqualified from prosecuting petitioner because the United States Attorney, who previously represented petitioner in the case, was personally disqualified.

2. Whether petitioner's concurrent 20-year sentences on two racketeering convictions involving a pattern of bribery directed at the state criminal justice system constitutes cruel and usual punishment, in violation of the Eighth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1656

STEVEN GOOT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A18) is reported at 894 F.2d 231. The order of the district court denying petitioner's motion to disqualify all attorneys in the United States Attorney's Office (C.A. App. E1-E8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1990. The petition for a writ of certiorari was filed on April 23, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Indiana, petitioner was con-

victed of conducting the affairs of an enterprise through a pattern of racketeering activity (RICO), in violation of 18 U.S.C. 1962(c), and conspiring to commit that offense (RICO conspiracy), in violation of 18 U.S.C. 1962(d). He was sentenced to 20 years' imprisonment and fined $25,000. The court of appeals affirmed. Pet. App. A1-A18.

1. The evidence at trial showed that petitioner, an attorney, conspired with Nick Morfas, a deputy prosecutor in Lake County, Indiana, to fix state prosecutions for driving under the influence of alcohol (DUI). Eleven such incidents constituted the predicate acts underlying petitioner's RICO convictions. C.A. App. A1-A7. In most of those instances, a defendant charged with DUI retained petitioner to represent him after having been released on bond. Petitioner agreed to the representation in return for a fee that included the bond money posted by the defendant, and the defendant gave him the bond receipt. Petitioner then filed motions to dismiss his client's case and contacted Morfas, who stole and destroyed the prosecution's (and sometimes the court's) case file concerning the client. After the case was dismissed, petitioner received a check payable to the person who initially posted the bond, which he turned over to Morfas. Morfas forged the payee's signature and cashed the check to obtain his share of the proceeds of the scheme. Pet. App. A2-A3.[1] Morfas

[1] The scheme was made possible by an unusual procedure that developed in Indiana courts with respect to the filing of DUI charges. The Indiana Supreme Court held in *Watts* v. *State*, 249 Ind. 674, 234 N.E.2d 471 (1968), that a person could not be charged with DUI through the issuance of a traffic ticket. As a result, defense counsel filed motions to dismiss DUI cases that had been instituted in that manner. The court would grant such a motion, with the condition that the prosecutor refile the case by information or affidavit within 30 or 60 days. If the prosecutor did not refile within the specified time,

pleaded guilty and, pursuant to his plea agreement, testified against petitioner at trial. *Id.* at 2A; see Pet. 8.

2. In early 1984, petitioner learned that he was a suspect in Operation Bar-Tab, a federal investigation of the fixing of cases in Lake County. In April 1984, he hired attorney James Richmond to represent him in the investigation. Richmond continued that representation until August 1985, when he was appointed United States Attorney for the Northern District of Indiana. Seven days before Richmond took office, he wrote a letter to Assistant U.S. Attorney Andrew Baker, in which he stated that he would disqualify himself in petitioner's case, among others. C.A. Supp. App. 16. The Executive Office for United States Attorneys in the Department of Justice and all AUSAs handling criminal cases in the Northern District of Indiana were immediately informed of Richmond's recusal. *Id.* at 17-18. When he assumed office, Richmond appointed AUSA John Hoehner to be "Acting United States Attorney" in the investigation. C.A. App. E3-E4; Pet. App. A4.

Petitioner was indicted in October 1987. Prior to trial, he moved to disqualify the entire U.S. Attorney's Office from the case because Richmond had previously represented him. C.A. Supp. App. 1-6. In response, the government filed an affidavit of Richmond stating that he had not communicated with Hoehner or any other AUSAs regarding any aspect of the prosecution and had never attempted to exert influence over the case. C.A. App. E4. The AUSAs involved in the case filed affidavits to the same effect. C.A. Supp. App. 9-11; Pet. App. A4. The government also filed an affidavit of the Legal Counsel in

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defense counsel would file a second motion to dismiss, which the court would grant as a matter of course. Pet. App. A3 n.4. Morfas's destruction of the prosecutor's case file effectively prevented a DUI case from being refiled after the first dismissal.

the Executive Office for U.S. Attorneys, who described that Office's policies and procedures concerning disqualifications. C.A. App. 12-15. He explained that Section 1-3.515 of the United States Attorneys' Manual (1985) requires a U.S. Attorney to disqualify himself when he has a conflict of interest, but requires recusal of the entire U.S. Attorney's office only in "exceptional cases" and as a "last resort," so as to avoid undue disruption of ongoing investigations. The Legal Counsel stated that based upon his review of the matter, this was not an "exceptional case" requiring recusal of the entire U.S. Attorney's Office under Section 1-3.515, and that it therefore was "entirely appropriate" for the designated AUSA to handle the prosecution. C.A. Supp. App. 13, 14-15; Pet. App. A6-A7.

3. The district court denied petitioner's motion to disqualify the entire U.S. Attorney's Office. C.A. App. E1-E8. It held that petitioner's motion should be decided under Rule 1.11(c) of the Indiana Rules of Professional Conduct (I.R.P.C.), which are patterned after the American Bar Association's Model Rules of Professional Conduct (1983) and which were made applicable in this case by Rule 1(f) (now Rule 1(g)) of the Local Rules of the District Court for the Northern District of Indiana. C.A. App. E6. Under I.R.P.C. Rule 1.11(c), a government attorney is disqualified from participating in a matter in which he participated personally and substantially prior to beginning government service.[2] The comment to the rule states,

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[2] I.R.P.C. 1.11(c) provides in pertinent part:

> Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:
>
> (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment * * *.

however, that it "does not disqualify other lawyers in the agency with which the lawyer in question has become associated." On that basis, the court held that "there is no need to disqualify the entire staff of a prosecutor who has been involved in a case while in private practice, provided that adequate screening procedures are used." C.A. App. E6. In the court's view, the affidavits filed by Richmond and his staff demonstrated that there had been adequate screening in this case. *Id.* at E8; see Pet. App. A4-A5.

The district court declined to follow several Indiana Supreme Court decisions cited by petitioner, *State* v. *Tippecanoe County Court*, 432 N.E.2d 1377 (1982), and *State ex rel. Goldsmith* v. *Superior Court*, 270 Ind. 487, 386 N.E.2d 942 (1979), which had interpreted the superseded Indiana Code of Professional Responsibility to require the disqualification of a prosecutor's entire staff when the prosecutor was personally disqualified. The district court found no indication in either case that screening procedures had been utilized, and it believed that the result in those cases would be different under the new I.R.P.C., especially where screening procedures are followed. C.A. App. E7. The court also noted that the Seventh Circuit had consistently held that screening procedures can rebut any inference of shared confidences or appearance of impropriety. *Ibid.*, citing *Schiessle* v. *Stephens*, 717 F.2d 417 (1983), and *LaSalle National Bank* v. *County of Lake*, 703 F.2d 252 (1983).

4. The court of appeals affirmed petitioner's conviction. Pet. App. A1-A18. It first held that disqualification of the entire U.S. Attorney's Office was unnecessary because, in accordance with the I.R.P.C. and internal Justice Department standards, adequate screening measures were followed to ensure that Richmond did not share

client confidences with the AUSAs in charge of the prosecution. *Id.* at A6-A11.[3]

The court also held that petitioner's concurrent 20-year sentences were neither unconstitutionally excessive nor arbitrary. Pet. App. A12-A15. It noted that successful challenges to the proportionality of particular sentences should be "exceedingly rare," and pointed out that two other Operation Bar-Tab defendants had received comparable sentences. *Id.* at A13-A14. The court also acknowledged the government's position that Morfas's four-year sentence was justified by his cooperation with the government, *id.* at A13-A14, and concluded that, in any event, "it is possible that [petitioner's] sentence is not too long, but Morfas's is too short." *Ibid.*

ARGUMENT

1. Petitioner first contends (Pet. 10-16) that the participation of attorneys in the U.S. Attorney's Office for the Northern District of Indiana in his prosecution violated his Fifth and Sixth Amendments rights. In his view, when the chief prosecutor in an office is disqualified from a case, the Constitution requires all attorneys in the same office to be disqualified as well. This claim is without merit.

a. The Sixth Amendment guarantees a defendant the assistance of counsel for his defense. Petitioner does not suggest that the AUSAs who conducted the prosecution interfered with the performance of the counsel who represented him in that prosecution. Petitioner's Sixth Amend-

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[3] In addition, the court of appeals agreed with the district court that no evidentiary hearing was required on petitioner's disqualification motion, because petitioner did "not make a substantial showing that any actual disclosure took place or that he was prejudiced in any way." Pet. App. A12.

ment objection instead is directed at Richmond, who previously had represented him in the matter (albeit before the indictment was returned, and therefore before petitioner's Sixth Amendment right to counsel attached). It is undisputed, however, that Richmond immediately disqualified himself from any personal participation in the prosecution on behalf of the United States precisely because of that prior representation. As a result, there can be no claim here that Richmond breached a Sixth Amendment duty of loyalty to petitioner by switching sides to represent the prosecution.

Petitioner's Sixth Amendment claim therefore must rest on the premise that Richmond possessed confidential information about petitioner's defense. We may assume that he did, but that fact alone does not make out a Sixth Amendment violation. No Sixth Amendment violation results from the presence in the government of someone with knowledge of confidential defense information or strategy unless that information is actually conveyed to the attorneys responsible for prosecuting the defendant or is used to the defendant's detriment. See *Weatherford* v. *Bursey*, 429 U.S. 545 (1977); see generally C. Wright & K. Graham, *Federal Practice and Procedure* § 5489, at 434 (1986) (collecting cases); compare *United States* v. *Morrison*, 449 U.S. 361 (1981) (no relief in Sixth Amendment context absent proof of prejudice). In this case, the district court found that the U.S. Attorney's Office instituted adequate procedures to ensure that Richmond did not convey confidential information to the AUSAs charged with petitioner's prosecution, and both Richmond and the AUSAs executed uncontradicted affidavits stating that nothing of the sort occurred. Indeed, petitioner appears to have abandoned his contentions, rejected below, that the government's screening procedures were inadequate.[4]

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[4] Although petitioner limits his argument in this Court to the claim that Richmond's appointment as U.S. Attorney, standing alone, re-

b. Petitioner also contends that the failure by the district court to disqualify all attorneys in the U.S. Attorney's Office violated the Due Process Clause. He does not, however, identify what protections furnished by the Clause he believes were violated. There is no suggestion, for example, that any of the AUSAs who participated in the prosecution had a financial or other personal interest in the case. Compare *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 249-252 (1980), with *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 803-808 (1987). Instead, he claims that there was a denial of fundamental fairness simply by virtue of the participation in the prosecution by attorneys who are employed in the same Office in which Richmond serves. Our system of government presupposes, however, that the integrity of governmental processes will

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quired disqualification of the entire Office, he quotes (Pet. 15) the court of appeals' observation that "more could have been done" by way of screening. See Pet. App. A9. That statement, however, simply introduced the court's speculation that Richmond "conceivably" could have obtained access to the case file (at night or on weekends) or to material on the Office's computer, and that a system of locked case files and coded access to electronic data would have prevented even that possibility. *Ibid.* Surely, however, the Sixth Amendment does not require such measures, premised on the notion that the U.S. Attorney could not be trusted to respect the screening procedure. Moreover, as the court of appeals specifically stated, the absence of these stringent measures did not "render infirm the screening mechanisms employed in this case." *Ibid.*

Similarly, although several pleadings filed by the government bore Richmond's name, the court of appeals credited the government's explanation that this resulted from the mistaken use of preprinted forms, not from any personal involvement by Richmond, and it noted that Hoehner actually signed the documents. Pet. App. A9-A10. Finally, the court concluded that Richmond's participation in other aspects of Operation Bar-Tab did not prejudice petitioner or undermine the screening of Richmond from petitioner's case. *Id.* at A10-A11.

be assured by the personal disqualification of an official who has a personal interest or conflict of interest, and that the responsibility for the particular governmental action therefore may properly devolve upon the official who is next in the chain of command within the department, agency, or office. See pages 11-12, *infra*. Moreover, this Court has made clear in other contexts that a defendant cannot establish a violation of his right to a fair trial in the absence of some showing of an adverse effect on his trial. See *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 872 (1982); *United States* v. *Agurs*, 427 U.S. 97, 104, 112-113 (1976); *United States* v. *Marion*, 404 U.S. 307, 324 (1971); see also *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984). The absence of any showing here that Richmond passed on confidential information to members of the prosecution team or influenced the course of the prosecution therefore defeats petitioner's Fifth Amendment claim as well.

c. Petitioner contends (Pet. 11-14) that review by this Court is necessary to resolve a conflict between the decision below and other decisions holding that when a defendant's lawyer becomes a prosecutor, all of the attorneys in the prosecutor's office are disqualified. None of the decisions petitioner cites, however, rests on an interpretation of the Fifth or Sixth Amendment. Instead, in each case the court found that participation of the attorneys in the office would create an appearance of impropriety or violate applicable rules of professional conduct. See *Arkansas* v. *Dean Food Products Co.*, 605 F.2d 380, 384 (8th Cir. 1979) ("[d]isqualification is an ethical, not a legal matter"); *Blair* v. *Armontrout*, 626 F. Supp. 512 (W.D. Mo. 1985) (relying on state bar rules); *United States* v. *Catalanotto*, 468 F. Supp. 503 (D. Ariz. 1978) (relying on state bar rules and decisions of state supreme court); *State* v. *Tippecanoe County Court*, 432 N.E.2d 1377 (Ind. 1982)

(relying on state ethical rules); *People* v. *Shinkle*, 51 N.Y.2d 417, 415 N.E.2d 909, 434 N.Y.S.2d 918 (1980) (appearance of impropriety); *State* v. *Cooper*, 63 Ohio Misc. 2d 1, 409 N.E.2d 1070 (Ct. Common Pleas 1980) (appearance of impropriety). These decisions therefore do not support petitioner's claim that he had a constitutional right to have the entire U.S. Attorney's Office disqualified in this case.

Moreover, as the district court observed, C.A. App. E7, it is by no means clear that the Indiana Supreme Court, upon whose rulings petitioner principally relies (Pet. 12-13), would continue to require disqualification of a state prosecutor's entire staff in this setting even as a matter of professional ethics, in view of the explicit statement in the commentary to Rule 1.11(c) of the Rules of Professional Conduct adopted by the American Bar Association and the Indiana Supreme Court that such disqualification is *not* required. See pages 4-5, *supra*.[5] In any event, the instant case is not controlled by the resolution of such issues by the state courts or by principles of state law, as petitioner appears to contend. The States of course are free to adopt their own rules for the assignment of prosecutorial responsibilities, the disqualification of state prosecutors and their staffs, and the conduct of attorneys in state court. But under the Supremacy Clause, those state rules do not of their own force govern the conduct of a criminal prosecution by federal prosecutors in federal court.

Even where private counsel are concerned, "[f]ederal courts admit and suspend attorneys as an exercise of their inherent power; the standards imposed are a matter of federal law." *In re Snyder*, 472 U.S. 634, 645 n.6 (1985); see 28 U.S.C. 1654. In carrying out that responsibility, the Dis-

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[5] In *Jaske* v. *State*, 539 N.E.2d 492, 496 (1989), an intermediate Indiana appellate court followed *Goldsmith* in ordering disqualification of the prosecutor's staff, but without mentioning the new Indiana Rules of Professional Conduct.

trict Court for the Northern District of Indiana has chosen to incorporate the Indiana Rules of Professional Conduct to govern the conduct of attorneys appearing before it. As we have explained, the district court has construed those Rules not to require disqualification of all attorneys in the U.S. Attorney's Office in a case such as this. Thus, petitioner's position finds no support in the general ethical standards of the legal profession that the district court has adopted as a matter of federal law.

Furthermore, this case does not involve the disqualification of private counsel for a private party. Petitioner's motion requested the district court to issue an order preventing officers and employees of a coordinate Branch (all attorneys in the U.S. Attorney's Office) from performing the responsibilities that were assigned to them within the Executive Branch. That is a matter to be addressed by the Acts of Congress and internal regulatory measures and directives that govern Executive Branch business and officials, not rules of conduct fashioned by the private bar or state and federal courts. Congress has vested in the Attorney General, not the courts, the responsibility to supervise the conduct of all litigation in which the United States is a party, 28 U.S.C. 516 and 518, to send "any officer of the Department of Justice * * * to any * * * district in the United States to attend to the interests of the United States in a suit pending in a court of the United States," 28 U.S.C. 517, and to "direct all United States attorneys [and] assistant United States attorneys * * * in the discharge of their respective duties," 28 U.S.C. 519. Within this statutory framework, Congress has made the prosecution of offenses in each judicial district the responsibility of the U.S. Attorney for that district (and therefore of his staff). 28 U.S.C. 547. Congress and the Attorney General also have adopted provisions requiring personal disqualifi-

cation in appropriate circumstances, but they have not mandated the disqualification of others within the same office on a theory of vicarious taint of the sort petitioner urges. See 18 U.S.C. 208(a); 28 U.S.C. 528; 28 C.F.R. 0.131 and Pt. 45.[6]

The regulations adopted by the Attorney General provide that attorneys employed by the Department of Justice "should be guided in their conduct by the Code of Professional Responsibility of the American Bar Association [the predecessor to the current ABA Model Rules of Professional Conduct]," although they do not incorporate that Code wholesale as a matter of federal law to govern Justice Department attorneys. 28 C.F.R. 45.735-1(b). Signifi-

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[6] 18 U.S.C. 208(a) requires the personal disqualification of an officer or employee of the United States who has a financial interest in a particular matter, but it does not extend that disqualification to others within the government. Compare 18 U.S.C. 207(g) (barring a private partner of an Executive Branch official from acting as attorney for anyone *other than the United States* in any matter in which the official has participated personally and substantially while in the government).

28 U.S.C. 528(a) directs the Attorney General to promulgate rules to "require the disqualification of any officer or employee of the Department of Justice, including a United States attorney or a member of such attorney's staff, from participation in a particular investigation or prosecution if such participation may result in a personal, financial, or political conflict of interest, or the appearance thereof." The regulations implementing this requirement do not contain the automatic rule of imputed disqualification that petitioner urges. See 28 C.F.R. Pt. 45. Similarly, the relevant provisions of the *United States Attorneys' Manual*, which also implement 28 U.S.C. 528(a), provide for imputed disqualification of an entire U.S. Attorney's Office only in "exceptional cases," of which this is not one.

Consistent with the foregoing principles, 28 C.F.R. 0.131 authorizes each United States Attorney "to designate any Assistant U.S. Attorney in his office to perform the functions and duties of the U.S. Attorney during his absence from office, or with respect to any matter from which he has recused himself."

cantly, the ABA Committee on Professional Ethics construed the Code of Professional Responsibility not to require disqualification of other attorneys in the same government agency when an attorney entering government had previously represented a private party in a matter, although it recommended that screening measures such as those followed here be adopted. ABA Formal Op. 342, 62 A.B.A.J. 517, 521 (1976). The Committee reasoned that "[n]ecessity dictates that government action not be hampered by such a construction" of the Code; that salaried government attorneys, unlike lawyers in private practice for whom rules of imputed disqualification were fashioned, do not have a financial interest in the success of legal representation by their office; and that the special responsibilities of government lawyers "lessen[ ] the temptation to circumvent the disciplinary rules through the action of associates." *Ibid.* The guidance furnished by the ABA Code, through the Justice Department's regulations, therefore furnishes an additional reason why petitioner's disqualification motion was unfounded even as a matter of professional ethics, not to mention as a matter of constitutional law.

Consistent with these principles, other courts of appeals, like the Seventh Circuit in this case, have declined to order the disqualification of an entire U.S. Attorney's Office when one attorney in that Office is disqualified, and have recognized the effectiveness of screening within the Office to prevent the sharing of confidential or privileged information. See *United States* v. *Caggiano*, 660 F.2d 184, 190-191 (6th Cir. 1981) (citing ABA Formal Op. 342), cert. denied, 454 U.S. 1149 and 455 U.S. 945 (1982); *In re Grand Jury Investigation*, 696 F.2d 449, 451-452 (6th Cir. 1982); *United States* v. *Grande*, 620 F.2d 1026, 1030-1031 (4th Cir.), cert. denied, 449 U.S. 830 (1980); *Grand Jury Subpoena of Ford*, 756 F.2d 249, 254 (2d Cir. 1985); *United States* v. *Badalamenti*, 794 F.2d 821, 828 (2d

Cir. 1986). See also *United States* v. *Standard Oil Co.*, 136 F. Supp. 345, 363 n.34 (S.D.N.Y. 1955). Review by this Court therefore is not warranted.

2. Petitioner also contends (Pet. 17-25) that his sentence constitutes cruel and unusual punishment, in violation of the Eighth Amendment. This claim is insubstantial.

As the court of appeals noted (Pet. App. A13), this Court has made clear that "[o]utside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [will be] exceedingly rare." *Solem* v. *Helm*, 463 U.S. 277, 289-290 (1983) (quoting *Rummel* v. *Estelle*, 445 U.S. 263, 272 (1980)); see also *Hutto* v. *Davis*, 454 U.S. 370, 374 (1982). This is not one of those "exceedingly rare" cases in which the sentence prescribed by the legislature is disproportionate to the crime under Eighth Amendment standards.

Petitioner bases his objection on the premise that he received the maximum sentence of 20 years on each of two counts for what he portrays as insignificant criminal conduct. But although the district court did impose the maximum sentence on each count, it provided for those sentences to run concurrently. 18 U.S.C. 1963(a). As a result, petitioner's sentence was only half the maximum that the court could have imposed. Furthermore, in *Solem* v. *Helm*, the defendant was sentenced to life imprisonment without possibility of parole, a fact the Court stressed in finding an Eighth Amendment violation and distinguishing *Rummel* v. *Estelle*, in which the defendant was eligible for parole. See 463 U.S. at 280-281, 302-303. Here, by contrast, petitioner was not sentenced to life imprisonment, and because he was sentenced under pre-1987 sentencing law, he will be eligible for parole after serving one-third of his sentence, 18 U.S.C. 4205(a) (1982) (repealed), as well as for good-time credits, 18 U.S.C. 4161 (1982) (repealed). Moreover, contrary to petitioner's assertion (Pet. 18-19), his crimes were not minor ones. While serving

as an attorney and officer of the court, he participated in a scheme to subvert the criminal justice process on at least eleven separate occasions by means of bribery. Petitioner's conduct therefore was far more serious than uttering a "no account" check for $100, the offense at issue in *Solem* v. *Helm*. Petitioner's sentence was therefore not out of line with his offense.

Petitioner contends (Pet. 19) that his sentence is out of line with the maximum sentence he could have received if he had been prosecuted for bribery under Indiana law (the predicate offense for his RICO convictions), because, under Indiana law, the maximum sentence for bribery is eight years. See *Solem* v. *Helm*, 463 U.S. at 291-292, 298-300 (comparing sentences authorized by law in same and other jurisdictions). This argument is without merit for several reasons. First, Congress reasonably concluded that the conduct addressed by the RICO provisions at issue here, which require proof of a pattern of racketeering activity, was particularly serious and deserving of special criminal sanctions under federal law. Second, petitioner's RICO convictions are based on eleven separate predicate acts of bribery; if petitioner had been prosecuted for each under Indiana law, he could have received a total of 88 years in prison, far in excess of what he received here. Third, the eight-year sentence authorized by Indiana law for a single offense of bribery roughly corresponds to the point in petitioner's federal sentence when he will be eligible for parole.

Petitioner also argues (Pet. 20-23) that his sentence should be set aside because it differs from the sentences actually received by Morfas and by defendants in other cases. But as the court of appeals pointed out (Pet. App. 14), petitioner's sentence is comparable to that imposed on two other defendants convicted in Operation Bar-Tab.

Morfas's shorter sentence is justified by his cooperation with the government in this case. See *id.* at 13. Moreover, if there is an unwarranted disparity between the two sentences, "it is possible," as the court of appeals observed, "that [petitioner's] sentence is not too long, but Morfas's is too short." *Id.* at A14.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 89-1656

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

STEPHEN GOOT, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO UNITED STATES' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Is the defendant's right to counsel and right of due process pursuant to the Fifth and Sixth Amendments of the United States Constitution violated when the United States Attorney's Office prosecuting the defendant has as the United States Attorney for that office, the attorney who originally served as defense counsel for the defendant and defendant is not afforded the opportunity of a hearing on his Motion to Disqualify the United States Attorney's Office?

2. Is the defendant's right against cruel and unusual punishment pursuant to the Eighth Amendment of the Constitution of the United States violated when the maximum sentence is imposed against the defendant by the court and said sentence is grossly disproportionate to a more culpable co-

defendant, grossly exceeds other sentences imposed on similarly situated defendants, grossly exceeds unenacted sentencing guidelines and is imposed with no comment or rationale given by the trial court?

No. 89-1656

IN THE

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October Term, 1989

STEPHEN GOOT, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO UNITED STATES' BRIEF IN OPPOSITION

Petitioner, STEPHEN GOOT, hereby replies to the Respondent, United States of America's Brief, and requests this court grant certiorari.

ARGUMENT

I.

THERE IS A VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS OF THE UNITED STATES CONSTITUTION WHEN A UNITED STATES

ATTORNEY APPOINTS A SUBORDINATE TO EFFECTUATE SCREENING OF A CONFLICT OF THE USA AND A DEFENDANT IS DEPRIVED OF AN EVIDENTIARY HEARING ON THE ISSUE OF DISQUALIFICATION OF THE UNITED STATES ATTORNEY'S OFFICE.

Respondent-government argues in their Brief in Opposition that the Indiana Rules of Professional Conduct do not warrant recusal of an entire United States Attorney's Office, that case-law has not recused an entire office where one attorney is disqualified and that absent explicit prejudice being demonstrated by the Petitioner, there is no basis for contending a violation of the Fifth Amendment Due Process Clause and Sixth Amendment Right to Counsel Clause. (Resp. 6-13). These three (3) arguments, however, ignore Petitioner's contention that (a) the Indiana Rules of Professional Conduct were not the controlling applicable rules at the time of this case, (b) that all present

case-law involving a conflict of a superior attorney in an office require recusal of the entire office, and (c) defendant was deprived his due process rights of the Fifth Amendment in failing to receive a hearing on the issue of recusal, and Sixth Amendment right to counsel in that the USA remained as the superior in the office to the Acting (Assistant) USA.

(A) Respondent argues that the Rules of Professional Conduct, specifically the commentary to Rule 1.11(c) support the practice of not disqualifying the entire USA's office. (Resp. 10). It is Petitioner's position, however, that the Code of Professional Responsibility and not the Rules are the applicable standards for this case.

The general rules of the United States District Court for the Northern District of Indiana, Rule 1(f), states: "The standard

conduct for those admitted to practice in this court shall be the Code of Professional Responsibility or Rules of Professional Conduct adopted by the highest court of the state in which this court sits, as amended from time to time by that state court, except as otherwise provided by the specific rules of this court." Petitioner argues that the Indiana Code of Professional Responsibility is the applicable ethical rules to be used for guidance in this matter, in that at the time of the disqualification of USA Richmond and the appointment by USA Richmond of John Hoehner as acting USA (October, 1985), the Code was in effect as the standards of conduct for attorneys in the State of Indiana. The Rules of Professional Conduct did not become effective in the State of Indiana until January 1, 1987.

Even if this court should find that the Rules of Professional Conduct are the controlling body of law, there is still error here. Rule 1.11 of the Indiana Rules of Professional Conduct prohibited a lawyer from participating "in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment." The Respondent argues that Rule 1.11(c) does not preclude disqualification, in that the comment to (c)(1) states that this "does not disqualify other lawyers in the agency with which the lawyer in question has become associated." This Rule, perhaps, permits continued prosecution by the "agency," the Justice Department. It does not, however, authorize continued representation by that particular "office." It is further noted that this Rule does not address the present scenario, where the individual being

disqualified is the individual who maintains control over the office.

(B) Respondent cites to several cases (Resp. 13-14), that they claim support the lack of necessity for the recusal of the entire office. These cases, however, involve conflicts of an assistant prosecutor or assistant USA. The Petitioner's case, is not merely an attorney from the USA's office, but rather the USA himself, the superior individual who manages, controls and assigns cases within the office. This supervisor-subordinate conflict cannot be rectified through screening mechanisms. As noted in the numerous cases cited by Petitioner, cases involving superiors require recusal of the entire office as opposed to a mere recusal of the specific attorney. (Pet. 11-13). As noted in United States v. Catalanotti, 468 F.Supp. 503 (D.Arizona

1978), despite the fact that there is no transfer of information, the proper remedy is to disqualify the particular office of the United States Attorney where a conflict exists.

(C) The constitutional issue is not merely an ethical question as perceived by Respondent. (Resp. 13). The Petitioner's claims of ethical violations in conjunction with the failure to provide a hearing to Defendant on the practices of the United States Attorney's Office as administered by USA Richmond, resulted in the Fifth and Sixth Amendment violation.

Respondent argues that because of USA Richmond's disqualification there is no breach of a "Sixth Amendment duty of loyalty to Petitioner by switching sides to represent the prosecution." (Resp. 7). Petitioner does not agree with this basic premise of Repondent. Petitioner argues

that a breach of loyalty does exist, despite recusal, in that a supervisor of an office in maintaining that position of control over his or her employees, has not really effecutated a complete recusal. As such, the very essence of the USA Richmond remaining as the supervisor over his subordinate, the Acting USA, is a switching of sides that is inherently prejudicial to Defendant.

Additionally, the lack of opportunity provided to Defendant to present evidence and cross-examine witnesses to demonstrate the improper screening, previously noted by Defendant, violated his rights of due process. (Pet. 16). Respondent's argument that due process is not proven, in that Defendant-Petitioner has failed to show the passing on of confidential information to members of the prosecutor's team, is premised upon cases where lack of an

adverse effect to trial was not proven. (Resp. 9). This, however, presupposes that one is given the opportunity to show this adverse effect. In the case at bar, the denial of a hearing and the Seventh Circuit acceptance at oral argument of the rendition of practices as argued by AUSA Milner (Pet. 16), was inherently improper as a violation of his Fifth and Sixth Amendment rights.

Finally, Petitioner notes that the Seventh Circuit Court of Appeals accepted that Petitioner-Defendant had a fundamental right not to be deprived of liberty without due process of law and in his Sixth Amendment right to counsel. (Pet. 15; App. A-11). However, unrefuted by the government is the fact that the court then uses a balancing test as opposed to strictly examining this issue to resolve whether the failure to disqualify the

entire USA's office was warranted. (Pet. 16). This failure of the government of "sustaining public confidence in its high level of integrity by dealing fairly, both in fact and in appearance, with criminal defendants" (Pet. App. A-11) warrants review by this United States Supreme Court.

II.

PETITIONER'S SENTENCE IS THE "EXCEEDINGLY RARE" CASE OF CRUEL AND UNUSUAL PUNISHMENT AND THEREFORE REVERSAL IS MERITED

In responding to Petitioner's argument that his sentence is violative of the Eighth Amendment of the United States Constitution, in that it is cruel and unusual punishment, the Respondent government argues that Petitioner's case is not one of the "exceedingly rare" instances that merit it being held as a disproportionate crime. Because the crime is not

a "no account" check for $100.00 and not a sentence of life without possibility of parole, the government argues that Solem v. Helm, 463 U.S. 277, (1983), is inapplicable and thus Petitioner's claim is insubstantial. (Resp. 14-15).

Respondent, however, has failed to completely refute Petitioner's argument as to why this case is aberrational in nature and thus does merit review.

The crime, RICO, like Solem's habitual offense, is a recidivist type statute. Solem, however, had numerous prior criminal offenses that warranted applicability of a recidivist type statute. In contrast, Petitioner has no prior offenses, has no connection with organized crime and has an exemplary background. Additionally, the alleged offenses of Petitioner involve neither violence nor threat of violence to any person.

Petitioner noted in his initial Brief that the underlying offense was what made Solem's sentence of habitual offender cruel and unusual despite his repeated criminal conduct. Likewise here, the underlying offense of state bribery charges does not merit a twenty (20) year sentence.

The Respondent-government theorizes that if the Defendant had been sentenced pursuant to the Indiana Statute for bribery, he could have received an eighty-eight (88) year maximum sentence. Hence, the government claims that the twenty (20) years imposed on Defendant Goot is not disproportionate. This theorizing, however, lacks validity under Indiana Law.

In Indiana, the maximum sentence for bribery, a class C felony, is eight (8) years. The government's mathematical calculation of eleven (11) counts multiplied by eight (8) years to equal

eighty-eight (88) years. presupposes the possibility of a defendant being eligible for consecutive sentences. Indiana case-law allows imposition of consecutive sentences only where at least one of the statutory aggravating circumstances, as specified by statute, is in existence. The failure to find and to articulate an aggravating factor will reverse an order of consecutive sentences to one of concurrent sentences. (See Taylor v. State, 442 N.E.2d 1087, 1092 (Ind. 1982); see also, Hansford v. State, 490 N.E.2d 1083, 1094 (Ind. 1986).)

Indiana Code 35-38-1-7(d) lists the seven (7) aggravating factors. Defendant Goot does not meet any of these conditions. One might contend that imposition of a reduced sentence might depreciate the seriousness of the crime. Indiana Code 35-38-1-7(b)(4). This factor,

however, may only be considered as aggravation "for the limited purpose of outweighing mitigating factors when the judge would otherwise reduce or suspend the sentence." Cuttingham v. State, 469 N.E.2d 1, 7, 10 (Ind.App. Ct. 1984). This factor alone cannot be used to impose consecutive sentences as opposed to a concurrent sentence. Id. Thus, at most Defendant four under Indiana law, would face a penalty of eight (8) years and as such, the imposition of a twenty (20) year sentence is clearly disproportionate.

Respondent also argues that Defendant's sentence is comparable to two (2) other defendants in Operation Bar-Tab. (Resp. 15). Like Defendant, these two (2) others were sentenced by the Honorable James Moody of the Northern District of Indiana. Like Defendant, these two (2) other individuals availed themselves of

their constitutional right to trial. Two (2) repeated sentences by one (1) particular judge that are wrong do not make a rightful or proper situation. Omitted from Respondent's Brief is any refutation to the fact that if sentenced under the present federal sentencing guidelines, the Defendant would have been eligible to receive a sentence of twelve (12) to thirty-eight (38) months. (Pet. 21). Omitted from Respondent's Brief is any refutation to the fact that the 1986 United States Department of Justice, Bureau of Justice Statistics, show a sentence of 95.8 months as the average for racketeering. A sentence of two hundred forty (240) months is grossly disproportionate to that mean. (Pet. 21). Likewise omitted from Respondent's Brief is any refutation to the fact that the co-defendant, who did not avail himself of his Sixth Amendment right

to trial, received by this same judge, a sentence of four (4) years despite the government, by its own admission, arguing that the co-defendant was the more culpable individual. (Pet. 22). Finally, omitted from Respondent's Brief is the fact that not one attorney or judge, many of whom were convicted of a greater number of offenses in Operation Greylord, received a sentence comparable in height to Defendant-Petitioner's. (Pet. 20-21).

Respondent-government in their Brief does not address a key aspect of this issue of Petitioner's, that being, the fact that a jurisdictional disparity exists on whether a sentence necessitates reversal and remand when a trial judge fails to explain the rationale of his or her sentence. (Pet. 23-25). As noted by Petitioner in his initial Brief, this is now mandated as a result of the passsage of

the new sentencing act, 18 USC 3553 (c). (Pet. 23). Prior, however, to enactment of this act, the Second Circuit did remand a sentence where the court failed to specify its rationale for sentence. (See United States v. Golumb, 754 F.2d 86 (2nd Cir. 1985); see also United States v. Hutchins, 757 F.2d 11 (2nd Cir. 1985)). The Seventh Circuit, although noting this unwise practice, does not adopt the position of the Second Circuit. (Pet. 24, App. A.14).

Defendant-Petitioner in his initial Brief, noted that this procedural disparity warrants review by the Supreme Court to resolve the diverse practices within these two (2) jurisdictions. (Pet. 24-25). Not only is Petitioner deprived of due process rights in being sentenced without being provided the rationale for his receipt of the sentence, but likewise this practice

makes the sentence received that within the category of cruel and unusual. It is a combination of all of the aforestated factors that make Petitioner's case the exceedingly rare instance that does necessitate review.

CONCLUSION

For all of the foregoing reasons, herein and previously stated. this Petition for Certiorari should be granted.

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